IN THE HIGH COURT OF JUDICATURE AT BOMBAY
SIDE JURISDICTION
CRIMINAL APPLICATION NO.3587 OF 2006

Balu Shankar Patil
C/1483, Kolhapur Central Prison,
Kalamba ...Applicant.
V/s.
State of Maharashtra ...Respondent.

Mr.Murtaza M. Najmi, adv. appointed for the Applicant.
Mr.A.A.Kumbhakoni, the Associate Advocate General.
Mr.D.P.Adsule, APP for the State.

CORAM: J.H.BHATIA, J.
DATE : 24th April, 2007.

ORAL JUDGMENT:

1. Heard Mr.Murtaza Najmi advocate appointed for the applicant, Mr.Kumbhakoni the learned Associate Advocate General and Mr.Adsule, the learned APP for the State.

2. Whether the proviso added to Section 428 Cr.P.C. by the Code of Criminal Procedure (Amendment) Act, 2005, which came into force with effect from 23-6-2005 is retrospective in operation is the important question of law raised in this application submitted by the applicant through jail.

3. To state in brief, the facts of the case are that the applicant was arrested on 7-1-1997 and was in custody as undertrial prisoner in murder case. Sessions

Case No.30 of 1997 was registered before the Sessions Court and after trial by the judgment and order dated 27-4-1998, he was convicted for the offence of murder punishable under Section 302 and was sentenced to undergo life imprisonment. Thus, he was in custody as undertrial prisoner from 7-1-97 till 27-4-1998 when he was convicted. By this application, he has requested this Court to give direction to the jail authorities that he should be given set off for the period during which he was undertrial prisoner against the sentence awarded to him.

4. Section 428 of the Cr.P.C. reads as follows:

> "428. Period of detention undergone by the accused to be set off against the sentence of imprisonment.--
>
> Where an accused person has, on conviction, been sentenced to imprisonment for a term ,not being imprisonment in default of payment of fine, the period of detention, if any, undergone by him during the investigation, inquiry or trial of the same case and before the date of such conviction, shall be set off against the term of imprisonment imposed on him on such conviction, and the liability of such person to undergo imprisonment on such conviction shall be restricted to the remainder, if any, of the term of imprisonment imposed on him:
>
> [Provided that in cases referred to in section 433-A, such period of detention shall be set off against the period of fourteen years referred to in that section.]"

5. Question is whether in view of this amendment to Section 428 of the Cr.P.C. an accused, who is awarded life imprisonment is entitled to get set off to the extent of period during which he was undertrial prisoner.

6. Mr.Kumbhakoni, the learned Associate Advocate General, contended that in the present matter mainly following two questions will arise:

> "(i) Whether the proviso to Section 428 of the Code of Criminal Procedure added by the Code of Criminal Procedure (Amendment) Act, 2005, operate retrospectively.
>
> (ii) Whether the benefit of the proviso to Section 428 of the Code of Criminal Procedure added by the Code of Criminal Procedure (Amendment) Act, 2005, can be given to the convicts who are already undergoing life imprisonment in implementation of conviction awarded prior to the coming into force of Code of Criminal Procedure Amendment Act, 2005."

Before coming to the questions, about the applicability and the manner in which the proviso to Section 428 is made applicable to the life convicts, it will be necessary to take stock of legal position about several aspects relevant for decision in this matter.

7. It is now well settled that life imprisonment

means imprisonment for life and unless, the concerned Government commutes or remits the sentence, the accused is required to undergo imprisonment for whole of his life. This legal position was settled first of all in **Gopal Vinayak Godse AIR 1961 Supreme Court 600** and recently **in Md. Munna v. Union of India & Ors. 2005 ALL MR (Cri) 217 (S.C.).**, it was held that the sentence of imprisonment for life is not for any definite period and imprisonment for life must be treated as imprisonment for the whole of the remaining period of the convict person's natural life. However, under Section 432 an appropriate Government has power to suspend or remit the sentence and under Section 433 the appropriate Government may, commute a sentence of death, for any other punishment provided by the Indian Penal Code and a sentence of imprisonment for life, for imprisonment for a term not exceeding fourteen years or for fine. Section 433-A of the Cr.P.C. reads as follows:

> "433-A. Restriction on powers of remission or commutation in certain cases--
>
> Notwithstanding anything contained in section 432, where a sentence of imprisonment for life is imposed on conviction of a person for an offence for which death is one of the punishment provided by law, or where a sentence of death imposed on a person has been commuted under section 433 into one of imprisonment for life, such person shall not be released from

> prison unless he had served at least fourteen years of imprisonment."

In view of this provision, when sentence of imprisonment for life is imposed on conviction of a person for an offence for which death is one of the punishment provided by law, or where a sentence of death imposed on a person has been commuted under Section 433 into one of imprisonment for life, such person shall not be released from prison unless he had served at least fourteen years of imprisonment. The offence of murder punishable under Section 302 carries punishment of imprisonment for life or death and when sentence of life imprisonment is awarded, Section 433(A) is applicable. The appropriate Government has power to remit the sentence under Section 432 and to commute the sentence under Section 433 of the Cr.P.C. In view of the proviso added to Section 428 by the Amendment Act of 2005, the period of detention shall be set off against the period of 14 years referred to in Section 433(A). It means if before conviction and imposition of life imprisonment, accused was in custody as undertrial prisoner, that period will be set off against the period of 14 years imprisonment. As this amendment came into force on 23.6.2005 question is whether the person, who was already convicted prior to coming into force of this amendment, would or would not be entitled to get set off for the period during which

he was undertrial prisoner. For this it will be necessary to find out whether the proviso to Section 428 Cr.P.C. is prospective, retrospective or ex-post facto law with retrospective effect.

8. Mr.Murtaza Najmi the learned counsel for the applicant contended that it is ex-post facto law with retrospective operation and, therefore, it will be applicable to all the accused persons, who were undergoing life imprisonment on the date, when this amendment came into force. At the outset, it may be stated that Mr.Kumbhakoni also took the same stand. However, before coming to the conclusion, it will be necessary to refer to the law settled in different cases by the Supreme Court. In **M/s. Punjab Tin Supply Co. Ltd. v. Central Government AIR 1984 SC 87,** Their Lordships had observed as follows in paragraph 17:

> "17. All laws which affect substantive rights generally operate prospectively and there is a presumption against their retrospectivity if they affect vested rights and obligations unless the legislative intent is clear and compulsive. Such retrospective effect may be given where there are express words giving retrospective effect or where the language used necessarily implies that such retrospective operation is intended. Hence the question whether a statutory provision has retrospective effect or not depends primarily on the language in which it is couched. If the language is clear and unambiguous effect will have to be given to the provision in question in

> accordance with its tenor. If the language is not clear then the Court has to decide whether in the light of the surrounding circumstances retrospective effect should be given to it or not."

9. In **State Bank's Staff Union v. Union of India & Ors. (2005)7 SCC 584**, Their Lordships observed as follows in paragraph 19.

> "19. Every sovereign legislature possesses the right to make retrospective legislation. The power to make laws includes the power to give it retrospective effect. Craies on Statute Law (7th Edn.) at p.387 defines retrospective statutes in the following words:
>
> "A statute is to be deemed to be retrospective, which takes away or impairs any vested right acquired under existing laws, or creates a new obligation, or imposes a new duty, or attaches a new disability in respect to transactions or considerations already past."

Their Lordships observed that every sovereign legislature possesses the right to make retrospective legislation and then considered what the "retrospective" means. Their Lordships observed as follows in paragraph 20 as follows:

> 20. Judicial Dictionary (13th Edn.) by K.J.Aiyar, Butterworth, p.857, states that the word "retrospective" when used with reference to an enactment may mean (i) affecting an existing contract; or (ii) reopening up of past, closed and completed transaction; or

> (iii) affecting accrued rights and remedies; or (iv) affecting procedure. Words and Phrases, Permanent Edn., Vol.37-A, pp.224-25, defines a "retrospective or retroactive law" as one which takes away or impairs vested or accrued rights acquired under existing laws. A retroactive law takes away or impairs vested rights acquired under existing laws, or creates a new obligation, imposes a new duty, or attaches a new disability, in respect to transactions or considerations already past."

Their Lordships further observed in paragraph 21 as follows:

> "21. In Advanced Law Lexicon by P.Ramanath Aiyar (3rd Edn., 2005) the expressions "retroactive" and "retrospective" have been defined as follows at p.4124, Vol.4;
>
> "Retroactive.--Acting backward; affecting what is past.
> (Of a statute, ruling, etc.) extending in scope or effect to matters that have occurred in the past. -- Also termed retrospective. (Black's Law Dictionary, 7th Edn., 1999)
>
> "Retroactivity" is a term often used by lawyers but rarely defined. On analysis it soon becomes apparent, moreover, that it is used to cover at least two distinct concepts. The first, which may be called "true retroactivity", consists in the application of a new rule of law to an act or transaction which was completed before the rule was promulgated. The second concept, which will be referred to as "quasi-retroactivity", occurs when a new rule of law is applied to an act or transaction in the process of completion.... The foundation of these concepts is the distinction between completed and pending transactions....' T.C.Hartley, Foundations of European Community Law, p. 129 (1981).
>
> * * *
>
> Retrospective.-- Looking back; contemplating

what is past.

Having operation from a past time."

10. In **T.Barai v. Henry Ah Hoe and another, AIR 1983 SUPREME COURT 150**, the Supreme Court observed as follows in paragraph 22:

> "22. It is only retroactive criminal legislation that is prohibited under Article 20(1). The prohibition contained in Article 20(1) is that no person shall be convicted of any offence except for violation of a law in force at the time of the commission of the act charged as an offence prohibits nor shall he be subjected to a penalty greater than that which might have been inflicted under the law in force at the time of the commission of the offence....."

In view of this authority, it becomes clear that the act, which was not prohibited or not offence at the time of commission would not be made an offence by some legislation with retrospective effect and nor a penalty greater than which might have been inflicted under the law in force could be made applicable to the act committed at a particular time by making a law later on with retrospective effect. Therefore, the retrospective or retroactive law, which takes away or impairs vested or accrued rights under the existing law or which creates a new obligation or imposes a new duty or attaches a new disability or which makes an act, which

was not an offence before the act, an offence under the Act, or which provides a punishment higher than that obtaining at the time of commission of the offence, is prohibited under Article 20(1) of the Constitution. However, if the law mollifies the rigour of the criminal law and thereby give certain benefits to the accused, that law is not prohibited under Article 20(1) of the Constitution of India.

11. In **Rattan Lal v. State of Punjab AIR 1965 7 SC 444**, there was a question whether benefit of Probation of Offenders Act, 1958 could be given to a person, who had committed the offence prior to the Probation of Offenders Act, 1958 had come into force. Their Lordships answered in affirmative and observed as follows in paragraph 7:

> (7). Let us now proceed to consider the question raised in the present case. This is not a case where an act, which was not an offence before the Act, is made an offence under the Act; nor this is a case where under the Act a punishment higher than that obtaining for an offence before the Act is imposed. This is an instance where neither the ingredients of the offence nor the limits of the sentence are disturbed, but a provision is made to help the reformation of an accused through the agency of the court. Even so the statute affects an offence committed before it was extended to the area in question. It is, therefore, a post facto law and has retrospective operation. In considering the scope of such a provision we must adopt the rule of beneficial construction

> as enunciated by the modern trend of judicial opinion without doing violance to the provisions of the relevant section."

12. In **Boucher Pierse Andre v. Superintendent, Central Jail (1975) 1 SCC 192**, the question was whether benefit of set off of the period of imprisonment undergone as undertrial prisoner could be given under Section 428 of the Cr.P.C. of 1973 to a person, who was convicted and sentenced prior to and was undergoing sentence of imprisonment at the time of enactment of Cr.P.C. of 1973. After quoting provisions of Section 428 of the Cr.P.C., Their Lordships observed as follows in paragraph 2:

> "2. The question which arises for determination in this petition is a narrow one and it rests on the true interpretation of Section 428. Is this section confined in its application only to cases where a person is convicted after the coming into force of the new Code of Criminal Procedure, or does it also embrace cases where a person has been convicted before but his sentence is still running at the date when the new Code of Criminal Procedure came into force ?..... There is nothing in this clause which suggests, either expressly or by necessary implication, that the conviction and sentence must be after the coming into force of the new Code of Criminal Procedure. The language of the clause is neutral. It does not refer to any particular point of time when the accused persons should have been convicted and sentenced. It merely indicates a fact situation which must exist in order to attract the applicability of the section and this fact situation would be satisfied equally whether an

> accused person has been convicted and sentenced before or after the coming into force of the new Code of Criminal Procedure. Even where an accused person has been convicted prior to the coming into force of the new Code of Criminal Procedure but his sentence is still running, it would not be inappropriate to say that the "accused person has, on conviction, been sentenced to imprisonment for a term". Therefore, where an accused person has been convicted and he is still serving his sentence at the date when the new Code of Criminal came into force, Section 428 would apply and he would be entitled to claim that the period of detention undergone by him during the investigation, inquiry or trial of the case should be set off against the term of imprisonment imposed on him and he should be required to undergo only the remainder of the term. Of course, if the term of the sentence has already run out, no question of set off can arise. It is only where the sentence is still running that the section can operate to restrict the term. This construction of the section does not offend against the principle which requires that unless the legislative intent is clear and compulsive, no retrospective operation should be given to a statute. On this interpretation, the section is not given any retrospective effect. It does not seek to set at naught the conviction already recorded against the accused person. The conviction remains intact and unaffected and so does the sentence already undergone. It is only the sentence, in so far as it yet remains to be undergone, that is reduced. The section operates prospectively on the sentence which yet remains to be served and curtails it by setting off the period of detention undergone by the accused person during the investigation, inquiry or trial of the case. Any argument based on the objection against giving any retrospective operation is, therefore, irrelevant."

13. In view of the question involved in the **Boucher Pierse Andre,** the said authority is aptly applicable to the question before this Court. Therefore, it must be

held that a person, who was convicted and sentenced to imprisonment for life prior to the Amendment Act of 2005 will also be entitled to the benefit of said proviso. In view of the proviso of law discussed above, it will be clear that the proviso to section 428 is ex- post facto law with retrospective effect in the sense that benefit of this proviso will be available to a person, who was convicted and sentenced to imprisonment for life prior to this amendment and was actually undergoing the sentence on the date when this amendment came into force. Naturally benefit of this proviso could not be available to a person, who had already undergone complete sentence and was released.

14. It will be necessary to bear in mind that by virtue of the proviso to Section 428, it can not be straight way held that a person, who is sentenced to imprisonment for life has to undergo imprisonment for 14 years only. That will be a misconception and misinterpretation of law itself. As held in Gopal Vinayak Godse, Md. Munna and in many other cases, imprisonment for life means whole of the remaining natural life of the accused persons. He will get benefit only if the appropriate Government remits or commutes the sentence either under Section 432 or 433 of the Cr.P.C. This is clear from **Bhagirath v. Delhi**

Administration (1985) 2 Supreme Court Cases 580. In that case, the question was whether the benefit of set off of imprisonment undergone as undertrial prisoner could be given to a life convict under Section 428 of the Cr.P.C. Holding that the benefit was available to a convicted person, Their Lordships observed as follows in paragraph 10 and 11.

> 10. The modalities for working out the provision contained in Section 428 in cases of persons sentenced to imprisonment for life should not present any serious difficulty in practice. In the first place, by reason of Section 433-A of the Code of Criminal Procedure, where a sentence of imprisonment for life is imposed on a person for an offence for which death is one of the punishments provided by law, or where a sentence of death imposed on a person has been commuted under Section 433 to one of imprisonment for life, such person cannot be released from prison unless he has served at least fourteen years of imprisonment....."
>
> 11. .....Under Section 432 of the Code of Criminal Procedure, the appropriate Government has the power to remit the whole or any part of the punishment to which a person has been sentenced. Under Section 433 of the Code, the appropriate Government has the power, inter alia, to commute the sentence of imprisonment for life to imprisonment for a term not exceeding fourteen years or to fine. The question of setting off the period of detention undergone by an accused as an undertrial prisoner against the sentence of life imprisonment can arise only if an order is passed by the appropriate authority under Section 432 or Section 433 of the Code. In the absence of such order, passed generally or specially, and apart from the provisions, if any, of the relevant Jail Manual, imprisonment for life would mean,

> according to the rule in Gopal Vinayak Godse, imprisonment for the remainder of life."

Finally Their Lordships allowed the writ petition of the life convict and directed that period of detention undergone by the accused as an undertrial prisoner shall be set off against the sentence of life imprisonment imposed upon them subject to the provision contained in Section 433A and provided that orders have been passed by the appropriate authority under Section 432 or 433 of the Code of Criminal Procedure.

15. The proviso to Section 428 is beneficial legislation for the benefit of persons, who are undergoing imprisonment for life.

16. The proviso added to Section 428 by the amendment of 2005 will come in picture only after the appropriate Government has passed an order to remit or to commute under Section 432 or Section 433 of the Cr.P.C. If such order is passed and life imprisonment is commuted to the imprisonment for the period of 14 years, for the purpose of calculation of the sentence of 14 years , which is to be actually undergone, the period during which the accused was in imprisonment as undertrial prisoner will have to be set off. For instance, if the sentence of life imprisonment is

commuted to imprisonment for a term of 14 years and the accused was in imprisonment for a period of two years as undertrial prisoner prior to conviction, the said period of two years will be set off against the imprisonment for a term of 14 years. It means after giving set off, he will have to actually undergo further 12 years imprisonment in the jail. Prior to this amendments, set off was given subject to the provision contained in Section 433A as held in **Bhagirath v. Delhi Administration**. In view of this the accused was required to undergo atleast 14 years of imprisonment after conviction. Period of set off could be considered for calculating period, which he had already undergone for the purpose of remission to be granted to him but he would be required to actually undergo sentence of imprisonment of 14 years after conviction. The Notes on Clauses in respect of Section 34 of the Amendment Act of 2005, by which the proviso to Section 428 was added, reads as follows:

> The provision of section 433-A adversely affects the reformation of lifer, whose case inspite of good conduct in jail cannot be referred to the Advisory Board for recommending his premature release to the State Government, unless he has completed 14 years of actual imprisonment. Proposed amendment to section 428 is intended to provide that the period for which the life convict remained in detention during investigation, inquiry or trial shall be set off against the period of 14 years of

> actual imprisonment prescribed in section 433-A."

From this it is clear that now for the purpose of reformation of the life convicts, the legislature found it necessary to give benefit of the set off against the period of 14 years of actual imprisonment prescribed in Section 433A.

17. In view of legal position in this respect, it is clear that benefit of set off under Section 428 can be given to life convict only after the appropriate Government has by special or general order remitted or commuted the said sentence under Section 432 or Section 433 of the Cr.P.C. and if such order is passed, by virtue of proviso added to Section 428 Cr.P.C. by the Amendment Act of 2005, period of imprisonment undergone as undertrial prisoner will be set off against the 14 years actual imprisonment as prescribed under Section 433A.

18. In view of this, if the appropriate Government passes an order and remits or commutes life imprisonment of the applicant under Section 432 or under Section 433 of the Cr.P.C. by general or special order, he will be entitled to get benefit of set off period during which he was in jail as undertrial prisoner prior to his

conviction.

19. Application stands disposed off accordingly.

20. Copy of this judgment be supplied to the accused/applicant and be also sent to Inspector General of Prisons for information and necessary action.

(J.H.Bhatia,J.)